1968

Fred G. Jensen and Miriam D. Jensen v. Ray L Nielsen and Mabel W. Nielsen : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FRED G. JENSEN and
MIRIAM D. JENSEN,
Plaintiffs and Appellants,

vs.

RAY L. NIELSEN and
MABEL W. NIELSEN,
Defendants and Respondents.

No. 11167

APELLANTS' BRIEF

Appeal from the Order Setting Aside and Vacating Summary Judgment of the Sixth Judicial District Court for Garfield County, Utah,
Honorable Ferdinand Erickson, Judge

MATTSSON & JACKSON
151 North Main
Richfield, Utah
Attorneys for Appellants

Tibbs & Tervort
50 North Main
Manti, Utah
Attorneys for Respondents

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NATURE OF THE CASE

This is an action for unjust enrichment, in which Appellants seek a review and reversal by the Utah Supreme Court of an Order Setting Aside and Vacating Summary Judgment entered herein by the Sixth District Court for Garfield County, Utah, which Order was made on Motions filed by Respondents to set aside and vacate a Summary Judgment entered in favor of Appellants and a Writ of Garnishment issued and served in an effort to collect the same.

DISPOSITION BY THE SIXTH DISTRICT COURT FOR GARFIELD COUNTY, UTAH

The lower Court entered a Summary Judgment in favor of Appellants by which it determined that Appellants were entitled to Judgment as prayed for in the Complaint, together with costs of Court. Respondents

filed two Motions, changing counsel between filings, both Motions requesting the court to set aside and vacate said Summary Judgment and a Writ of Garnishment issued in an effort to collect said Judgment. The lower Court ordered: (a) That Appellants' Summary Judgment for $15,071.00 and $36.40 costs of Court be set aside and vacated and that Respondents have ten days to file amended Answers; (b) That the Motion to Set Aside Appellants' Writ of Garnishment be denied and the cashier's check for $2,378.57 obtained by Appellants by virtue of said Writ be impounded by the Court.

NATURE OF RELIEF SOUGHT ON APPEAL

The Appellants seek to have the Utah Supreme Court reverse the Order of the lower Court in connection with its determination to vacate and set aside Appellants' Summary Judgment and to require the lower Court to release the impounded cashier's check.

STATEMENT OF FACTS

Appellants brought an action in February, 1965, in the Sixth Judicial District Court for Garfield County, Utah, seeking restitution based on Respondents' unjust enrichment (R. 1-6). The action arose out of a Contract between the Parties for the purchase by Appellants and sale by Respondents of Nelson's Motor Court, 308 North Main, Panguitch, Utah. Said Contract was entered into on or about July 1, 1958. Appellants paid $10,150.00 down, took possession and fully performed the Contract to November 1, 1961, made total monthly payments of

$6,800.00 and added substantial improvements to the property. Following Appellants' inability to continue monthly payments, Respondents notified them of rescission of the Contract, removed all documents from escrow, retook possession of the property on or about July 1, 1962, and retained all payments made. Respondents Answered and Counterclaimed on or about June 20, 1965 by and through Attorney Ken Chamberlain (R. 7-9). Appellants served and filed a Request for Admissions, with three Exhibits attached, in January, 1966 (R. 10-19). The same were admitted by Respondents' failure to answer within the time specified or at all. Later, the Court disposed of said Counterclaim at which time Respondents were represented by Attorney John T. Vernieu (R. 20-21). In May, 1967 Appellants gave Notice to Respondents of Taking Deposition of Mr. T. H. Heal on Written Interrogatories at Provo, Utah (R. 28, 29). Said Notice was served on Durham Morris, Attorney at Law, Cedar City, Utah, who appeared and represented the Respondents during March, April and May, 1967 (R. 51-53, 71-74). On July 18, 1967, Appellants' Direct Interrogatories to Mr. T. H. Heal and his Answers to the same were filed with the Court (R. 30, 31, 32-36).

On August 14, 1967, Appellants served on each Respondent a Notice of Motion with Motion for Summary Judgment attached noticing the same for hearing on August 29, 1967 (R. 37, 38). Respondents were further notified of said hearing by telephone, in person orally, by personal delivery and additional mailing of copies of said Notice and Motion (R. 51-53) on August 15 and 16,

1967. Said Motion states that it is "based on all of the files and records herein, inluding the pleadings and admissions of Defendants and Answers to Written Interrogatories by Deposition on file" (R. 38). The Appellant Fred G. Jensen and his Counsel appeared at the time fixed for said hearing. The Respondents did not appear in person or by Counsel. The Motion was presented to the Court and granted (R. 41-44). Notices of Entry of Judgment with copies of Summary Judgment for Plaintiffs attached were served upon each of the Respondents on September 5, 1967 (R. 45, 46). In September, Appellants received a cashier's check in the amount of $2,378.57 from the First State Bank of Salina, Panguitch, Utah through a Garnishee Judgment and Execution thereon based on a Writ of Garnishment. On or about September 28, 1967, Attorney John T. Vernieu, representing Respondents a second time, served on Appellants a Notice and Affidvait to set aside and vacate the Summary Judgment, the Writ of Garnishment and Garnishee Judgment (R. 47, 48, 49, 50). The same was based on the ground that the Summary Judgment "was taken against the Defendants by virtue of mistake, inadvertence, surprise or excusable neglect" (R. 47). Mr. Vernieu resigned and withdrew from further representation of Respondents on November 29, 1967 (R. 51-53, 71-74). Respondents second Motion and Notice for Hearing (R. 55, 56) to set aside said Summary Judgment and Writ of Garnishment was served on Appellants by Attorney Don V. Tibbs on December 15, 1967. Said Motion states two grounds, the first being the same as stated in the Motion filed by

Mr. Vernieu. The second ground was "Plaintiffs' failure to comply with Utah Code Annotated 78-51-36 throughout these proceedings" (R. 56).

Respondents' Motions came on for hearing December 21, 1967 and they appeared in person with Counsel, Don V. Tibbs. Appellants appeared by Counsel, Norman H. Jackson and Carvel Mattsson (R. 57-86). Mr. Tibbs stated, "The grounds of the motion without restating them, as are set forth on the original Motion as filed by Mr. Vernieu and likewise as set forth in the Motion in which I entered an appearane" (R. 58). Mrs. Mabel W. Nielsen, one of the Respondents, testified (R. 59-74). Then Mr. Tibbs raised two additional grounds not stated in the written Motions or ever raised or mentioned before (R. 74-75). Following argument by Counsel the court granted the "Motion to Set Aside the Default" (R. 83) and impounded the money reached by the Writ of Garnishment. The Order Setting Aside and Vacating Summary Judgment (R. 89-90) was filed January 4, 1968, and recites as grounds for said Order findings that (a) "the Court does not agree with Defendants' contention that Plaintiffs failed to give proper Notice to Defendants in regards to the withdrawal of attorneys," (b) "the Court finds that there was mistake, surprise and excusable neglect on the part of the defendants . . . in their not being present for the hearing on August 29, 1967" and (c) "the Court finds it should have taken evidence to justify the Judgment which was granted" (R. 90). Appellants have taken the instant appeal from said Order.

ARGUMENT

POINT I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT THERE WAS MISTAKE, SURPRISE AND EXCUSABLE NEGLECT ON THE PART OF THE DEFENDANTS IN NOT APPEARING FOR THE HEARING ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON AUGUST 29, 1967.

In its written Order Setting Aside and Vacating Summary Judgment there is a recital of a finding by the Court that there was mistake, surprise and excusable neglect on the part of the Respondents in not appearing for the August 29, 1967 hearing on Appellants' Motion for Summary Judgment (R. 90). The Court did not make any such finding at the hearing on December 21, 1967. On the contrary, the transcript of said hearing shows that the Court found and recited the opposite view:

> "THE COURT: I don't think there is any dispute but what notice has been given of the matters and things that have transpired." (R. 76)

> "THE COURT: It has tried the patience of everyone but whether that is a sufficient cause to deny the Defendants a right to come and bring in a defense and I know they haven't done and they had an opportunity, there is no doubt about that, ample opportunity." (R. 83)

The Respondent Mable W. Nielsen testified to the same fact:

> "Q. (Mr. Tibbs) Mrs. Nielsen, did you understand that there would be a hearing take place on August 29, which would be the trial of this

cause in which the Court would be asked for a Judgment against you?"

"A. I didn't understand there was anything pertaining to a Judgment against us. I was notified that there would be a trial or hearing at that time, yes." (R. 60)

"Q. (Mr. Tibbs) Mrs. Nielsen, did you receive any notice advising you to be in Court on August 29, 1967?"

"A. Yes, I did." (R. 63)

"Q. (Mr. Jackson) Mrs. Nielsen, would you state for our information what notice you received concerning the hearing on August 29th? Was it a written notice?"

"A. It was a written notice." (R. 63)

"Q. (Mr. Jackson) Notice of Motion for Summary Judgment?"

"A. No, I don't know anything about a Summary Judgment. What ever the case was on the 29th, I know I received a copy." (R. 64)

Mrs. Nielsen continued to testify to the fact that she did receive written Notice of the August 29th hearing for Summary Judgment and that she had the same in her possession (R. 65, 66). She further testified that she received the written Notice in a timely manner in advance of the time fixed for hearing:

"Q. (Mr. Jackson) Did you receive this more than five days before August 29th?"

"A. Just at the time I can't tell you."

"Q. Was it a few days before or was it . . ."

"A. No, it seemed to me that it was quite a while before."

"Q. More than a few days before?"

"A. Yes." (R. 65)

The Respondents attempted to justify their neglect, failure and refusal to appear by reason of Mr. Nielsen's health. This is discussed in Mr. Nielsen's affidavit (R. 49, 50) and Mrs. Nielsen's testimony (R. 60-63). In *Warren v. Dixon Ranch Co.* 123 Utah 416, 260 P. 2d 741, 743 (1953) the Utah Supreme Court examined a comparable affidavit to the effect that a part upon whom personal service was made "is and has been seriously ill and did not notify the interested parties." The Court held:

> "We are not told the nature of the illness and it does not appear that appellant . . . was so incapacitated that he could not have called an attorney to have his rights and the rights of the corporation protected. Illness alone is not sufficient to make neglect in defending one's action excusable."

Mr. Nielsen's affidavit is completely silent concerning receipt of the written Notice and Motion for Summary Judgment. He also fails to mention that he telephoned Mr. Jackson and discussed the matter following receipt of said documents and that copies of Notice and Motion were personally delivered to him by Mr. Jackson (R. 51-53). Mr. Nielsen states "I was ill and indisposed and on August 29, 1967 I had made plans to go to the State of Nevada for a business connection relating to a possible sale of my motel property at Panguitch, Utah"

(R. 49). He doesn't say when he was ill and indisposed. He was raking his yard on August 16 (R. 53), and he conveniently omits the fact, as testified to by Mrs. Nielsen (R. 66-68), that he made a trip on August 29th for the purpose of making a business transaction. If he was able to perform these physical and mental functions on August 29th, he was able to appear in Court. Since Mrs. Nielsen accompanied him, she too was able to attend said hearing. Both Respondents wilfully and knowingly absented themselves from their residence and the courtroom at the time fixed for hearing. The Utah Supreme Court in discussing an earlier statute with the same provisions as the present Rule 60 (b), *Utah Rules of Civil Procedure,* ruled as follows:

> "In order to bring a case within the foregoing provision (i.e. mistake, inadvertence, surprise or excusable neglect) the moving party must show that he has used due diligence to prepare and appear for trial, and present his defense, and that he was prevented from doing so because of some accident, misfortune, or combination of circumstances over which he had no control. If, however, the record discloses mere carelessness, lack of attention, or indifference to his rights on the part of applicant or his counsel, he cannot expect an opportunity to redeem the past. If a party's negligence is without excuse or justification, he must abide the consequences." *Peterson v. Crosier,* 29 Utah 235, 243-244, 81 P. 860 (1905)

In his affidavit, Mr. Nielsen states that the matter of appearing at and attending the hearing on August 29th was not "specifically discussed" (R. 50). On the con-

trary, this was the matter which was specifically discussed. The purpose of Mr. Jackson's call was to make personal service of the Notice and Motion which had been returned by Respondents marked "Refused" and to personally advise Respondents that the hearing would proceed as scheduled. Personal service of the same was made and Mr. Nielsen was specifically advised that Respondents were to be in Court on August 29th (R. 53).

At the time of service of said Notice and Motion, by mailing, Respondents were not represented by an attorney, their third attorney, Durham Morris, having withdrawn. Rule 5 (b) (1) of the *Utah Rules of Civil Procedure* provides as follows:

> ". . . . Service upon the attorney or upon a party shall be made by delivering a copy to him or mailing it to him at his known address. . . . Service by mail is complete upon mailing."

Copies of the Notice of Motion were mailed to Respondents individually on August 14, 1967, stating thereon that this was done because they had no counsel of record. Although said Rule 5 actually requires no further notification, when Respondents refused said mailing, Appellants in an effort to be certain that Respondents were aware of the proceedings, made further notifications. The Record, as summarized in Mr. Jackson's Counter-affidavit (R. 51-54) shows that Respondents were notified of said August 29th hearing by the following means:

> (1) Mailing to Respondents on August 14, 1967, pursuant to Rule 5 (b) (1) of the Utah Rules

of Civil Procedure, of copies of Notice and Motion.

(2) By telephone on August 15, 1967, when the Respondent Ray L. Nielsen telephoned Appellants' attorney.

(3) In person, orally, on August 16, 1967 by Appellants' attorney speaking to Mr. Nielsen.

(4) By personal delivery on August 16, 1967 of copies of Notice and Motion to Mr. Nielsen by Appellants' attorney.

(5) By re-mailing to Respondents on August 16, 1967, pursuant to said Rule 5 (b) (1), of copies of Notice and Motion.

The foregoing shows that Appellants complied with the requirements of the Utah Rules of Civil Procedure in giving Respondents notification of the time fixed for hearing said Motion for Summary Judgment in proper and timely manner. Respondents admit receipt of timely notification, but absented themselves from said hearing in such a manner and for such a reason as to confirm that they were capable of appearing, if they had chosen to do so. However, they elected to completely disregard and totally ignore the proceedings of the Court. Their decision was wilfully made with knowledge and was not the result of mistake, surprise or excusable neglect. The Court acknowledged that Respondents had "ample opportunity" to appear. Nowhere, except in the written Order prepared by Respondents' attorney and now appealed from, did the Court make a finding of any just cause on the part Respondents for their non-appearance. The Court did not, at the hearing or in its Order, specify any

mistake, surprise or excusable neglect as required by Rule 60 (b), *Utah Rules of Civil Procedure*. The Court's decision went off onto other matters, hereinbelow discussed, thereby erring in vacating and setting aside Appellants' Summary Judgment.

POINT II

THE COURT ERRED IN IT'S FINDING THAT "IT SHOULD HAVE TAKEN EVIDENCE TO JUSTIFY THE JUDGMENT WHICH WAS GRANTED" SINCE:

A. THIS GROUND WAS NOT STATED OR RELIED UPON IN EITHER OF THE MOTIONS TO VACATE AND SET ASIDE SUMMARY JUDGMENT FILED BY EITHER OF THE DEFENDANTS' ATTORNEYS AND WAS NOT AN ISSUE PROPERLY BEFORE THE COURT FOR DETERMINATION.

B. THE RECORD SHOWS THE MOTION FOR SUMMARY JUDGMENT WAS MADE AND GRANTED ON THE BASIS OF DEFENDANTS' ADMISSIONS, A DEPOSITION AND THE COMPLETE FILES AND RECORDS IN THE ACTION.

Following Mrs. Nielsen's testimony, Mr. Tibbs directed the Court's attention to the second ground stated in Respondents' written Motion prepared by him, that is, failure of Appellants to give written notice pursuant to Section 78-51-36, *Utah Code Annotated*, 1953, to Respondents when Respondents' other attorneys withdrew from representation (R. 74). In *Van Cott et al v. Wall*, 53 Utah 282, 291, 178 P. 42 (1919) the predecessor of the present statute was held not to apply where an attorney withdraws from the case, and does not wholly cease the practice of law. Such was the case with each of Respondents three prior attorneys who withdrew on four prior occasions pursuant to Section 78-51-34, *Utah Code*

Annotated, 1953, "upon his own consent filed with the Court" and pursuant to the long established practice in

We cite 42 A.L.R. 134 and Security Adjustment Bureau, Inc., v. West 20 Utah 2d 292, 437 P. 2d 214 (1968) in connection with this point."

Without dwelling on the foregoing ground, Respondents' Counsel quickly amended the Motions, asserted and inserted into the record two completely new grounds (1) "that there was no evidence submitted to the Court or taken" when the Summary Judgment was granted and (2) that "numerous papers in this case" were not filed until after the Summary Judgment was taken (R. 74-75).

Utah Rules of Civil Procedure, Rule 7 (b) (1) provides:

> "Motions. An application to the Court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds thereof, and shall set forth the relief or order sought."

Respondents' Counsel was either making new motions or amending their written motions by adding thereto new and additional grounds not specified in the original motions. The effect of this was to confuse the Court and surprise Appellants' Counsel.

The ensuing colloquy between the Court and Counsel shows that the Court was caught unaware and was confused and surprised by the oral motions or amendments raised by Respondents' Counsel (R. 77-83).

In this state of confusion and surprise the Court erred as follows:

(1) It forgot that the Motion for Summary Judgment was "based on all the files and records herein, including the pleadings and admissions of Defendants and Answers to written Interrogatories by Deposition on file" (R. 38).

(2) It did not know the purpose of the Notice of Taking Deposition on Written Interrogatories in the file (R. 80).

(3) The Court did not recall that the Deposition of Mr. T. H. Heal was opened and ordered published and made a part of the record at the hearing on August 29, 1967 (R. 77-78).

(4) The Court stated that the "deposition is not evidence" (R. 77-78).

(5) The Court thought the Summary Judgment was for $23,000.00 instead of $15,071.00 plus eight percent interest (R. 79-80).

(6) Considered that it was setting aside a Default and Judgment by Default (R. 81, 82, 83) instead of a Summary Judgment based on Notice and Motion after Respondents had made repeated appearances by various attorneys for a period of two and one-half years.

(7) Did not know why there were no Findings of Fact accompanying the Summary Judgment (R. 81). Rule 52, *Utah Rules of Civil Procedure,* provides that findings of fact and conclusions of law are unnecessary on decisions of motions for Summary Judgment.

(8) Based its decision on Rule 55 (c), *Utah Rules of Civil Procedure,* Setting Aside Default, even though not relied on orally or in written motions by Respondents.

The foregoing clearly illustrates that the Court and Appellants were totally uninformed that Respondents would rely on said grounds or theories in support of their Motions. Prejudice resulted from failure to comply with the requirements of said Rule 7 (b) (1) which are not mere technical requirements but are real and substantial. If the rule is construed otherwise, to permit what happened here, motion procedure would become chaotic. The clear meaning and intendment of said Rule is that only motions which are incidental to the orderly progress of the proceedings may be made orally.

The Statement of Proceedings August 29, 1967 (R. 41-44) approved by the Court and verified by the Court Reporter and Appellants' Counsel shows that the Motion for Summary Judgment was submitted to the Court on the files, records, pleadings, admissions of Respondents and Deposition, as stated in the Motion. After the facts in these documents of record were called to the Court's attention and the applicable law of Utah reviewed before the Court, the Court granted the relief prayed for. Rule 56, *Utah Rules of Civil Procedure,* provides that Summary Judgment can be rendered on the pleadings, depositions and admissions on file, together with affidavits, if any.

The lower Court and not Counsel for Appellants must accept responsibility for any confusion created by

its own record as shown by Clerk's Certificate (R. 101-103), and the Court's failure to locate Plaintiffs' Exhibits 1 and 2 (R. 76). Appellants' are not aware of any provision in the Utah Rules of Civil Procedure making this a ground for vacating and setting aside Judgments.

POINT III

THE COURT ERRED IN STATING ORALLY AT THE HEARING ON DEFENDANTS' MOTION TO VACATE AND SET ASIDE THE SUMMARY JUDGMENT HEREIN THAT SUCH A JUDGMENT COULD NOT BE GRANTED ON THE BASIS OF ADMISSIONS OF PARTIES AND DEPOSITIONS.

As discussed above, a Motion for Summary Judgment may be made on the pleadings or the record or it may be supported by affidavits. Admissions of parties and depositions, although useful, are not absolutely necessary. The Motion is usually heard and granted without any testimony whatsoever. In fact, Rule 12 (c), *Utah Rules of Civil Procedure,* Motion for Judgment on the Pleadings, provides a form of Summary Judgment, without requiring testimony, evidence or documents other than the pleadings of the parties on file. If additional matters such as admissions, answers to interrogatories, depositions, and affidavits are considered by the Court, the Motion is automatically converted to a Motion for Summary Judgment to be disposed of pursuant to said Rule 56. Accordingly, the lower Court was mistaken and in error in stating that "There's got to be some proof taken" (R. 77) and in reliance on this error in ruling that "the deposition is not evidence" (R. 78).

"We cite Gurvitz v. David K. Richards Company 20 Ut. 2d 232, 436 P. 2d 794 (1968) in connection with this point."

CONCLUSION

Appellants respectfully contend that the lower Court should be reversed and the impounded cashier's check released. In the lower Court, Respondents' written Motions raised only the following two grounds in a proper and timely manner as justification for Respondents' failure to appear at the hearing on Appellants' Motion for Summary Judgment: (1) mistake, surprise and excusable neglect (2) no written notice by Appellants to Respondents each of the four times Respondents' attorneys withdrew. As to the first ground, the record shows that Appellants gave proper and timely written notice by mailing which Respondents refused. Appellants gave further notification by other means confirming the time, place and nature of the hearing. On the other hand, Respondents' actions reveal a course of conduct is defiance of the Court's procedure by hiring and firing attorneys at will, refusing to receive mailings notifying them of the hearing and entry of judgment, and departure from the place of hearing at the time it was scheduled. All of this was done by Respondents wilfully and with knowledge and not as a result of mistake, surprise or neglect that is excusable. The lower Court acknowledged this, but ignored it completely in arriving at its decision. In connection with the second ground above, although Respondents' attorneys withdrew from this case, none of them ceased to act as an attorney. Accordingly, Appellants were under no obligation to notify Respondents of said Withdrawals of which Respondents were already well aware.

At the hearing on Respondents' Motions, they raised new grounds in support of the same. The new grounds were (1) no evidence in support of Summary Judgment and (2) the condition of the Court file. The lower Court erred in permitting said grounds to be raised and also in proceeding to base its decision on the first of said new grounds. Respondents are attempting to use the same tactic on this appeal as shown by their Statement of Points, portions of Point III and all of Point IV being raised here for the first time. They should not be permitted to do so. In view of the foregoing, Appellants submit that the Parties should be restored to the same status and position as obtained in this case prior to the filing of Respondents' Motions.

Respectfully submitted,

MATTSSON & JACKSON
151 North Main
Richfield, Utah